IN THE CIRCUIT COURT OF THE CITY OF SUFFOLK, VIRGINIA.

IN RE VALIDITY OF LOCAL OPTION ELECTION HELD IN THE CITY OF SUFFOLK, ON THE 19TH DAY OF DECEMBER, 1910.

Constitutional Law—Elections—Provisions as to Registration Mandatory.—The provisions of § 2 , cl. 2, of the Constitution (1902), prescribing how applications for registration shall be made, are mandatory, and names otherwise placed upon the registration books, without compliance therewith, were placed there without authority, and the vote of such persons should not be considered in ascertaining the result of an election in which they have participated.

For petitioners, *R. Randolph Hicks.*
For contestees, *Lee Britt* and *J. U Burges.*

OPINION.

JAS. L. MCLEMORE, Judge: J. C. Bell and twenty-three others, by counsel, filed their petition in the Circuit Court of the City of Suffolk, alleging among other things that "said election was undue and the returns thereof from the 1st, 3rd and 4th wards of said city were false in the following particulars, etc." One of the particulars was that no written application was ever made out by the voter desiring to be registered, or required by the registrar as a prerequisite to the placing of his name on the registration books. To this petition counsel for contestees filed their demurrer, the effect of which is to present for my decision the question along with numerous others of the legal result following the failure on the part of registrars to observe strictly the requirements of the Constitution and the laws passed in pursuance thereof; and particularly the effect of a failure to require the applicant for registration to observe § 20 (clause 2) of the Constitution, which reads as follows:

"Second. That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date, and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted, and, if so, the state, county, and precinct in which he voted last."

The contestants allege that seventy-six citizens, whose names were on the registration books, and who voted against the licensing of the sale of intoxicating liquors, were improperly registered and were therefore improperly on the registration books, should not have been permitted to vote, and having voted should

not be considered in ascertaining the result of the election. On the part of the contestees it is earnestly insisted that the remedy for those complaining was to have applied, prior to the day of the election, to the registrar to have the books purged of the illegal names as provided in § 86 of the Code, and that having failed to do this, no remedy remains to them, and the books of the registrar are now conclusively presumed to be right in so far as the petitioners are concerned. Both the recent case of Spilter *v.* Guy, 107 Va. 811, and the very recent newspaper report of the opinion of Judge Christian, of Lynchburg, rendered in a case in some respects similar to this, are cited as authority for the position taken by contestees, as well as § 25 of the Constitution.

Whether or not there is any appeal from the decision of the registrar under § 86 of the Code save to the voter whose name is claimed to be improperly on the books is not entirely clear. This section reads:

"It shall be lawful for any five qualified voters of any election district, fifteen days previous to either of the regular days of registration, to post written or printed notices at not less than three public places in said district, including the voting place therein, of the names of all persons alleged by said voters to be improperly on the registration books of that district. The notice shall be signed by the persons posting same. On the regular day of registration, the registrar shall hear testimony produced for or against the right of persons named in said notice to be retained on the registration books; and if he be satisfied that any person mentioned in said notice has removed from the election district, has died, or for any other reason is not a qualified voter, he shall strike his name from the registration books. From such decision of the registrar any person may appeal in the same manner as is provided in § 83. The registrar shall immediately after the regular day of registration, post written or printed notices at the voting place, and at two other public places in his election district, of all the names stricken from the registration books. If the registrar should be unable to hear the evidence in reference to the names posted on the regular days of registration the books may be kept open as to such names only, for four days." From which it will be observed that testimony is to be heard both for and against the person whose name is desired to be removed from the books. The reference to § 83 of the Code, I think, clearly has to do with the *mode of procedure* and has no reference to the *person* entitled to exercise the right of appeal. Why the five voters who feel aggrieved by the findings of the registrar must submit to his will when the one voter on the other side may appeal from an adverse ruling, is not altogether clear to me, and I do not

think the statute ought to be so construed, unless the language is plain. To hold the registrar's finding in such case supreme, would be to place in his hands powers not in my judgment warranted by the language of the statute,— powers too often exercised by extreme partisans not a little interested in the impending contest,—and being against sound public policy, should not be so construed unless the language is clear and convincing. I do not think the language is either clear or convincing.

The statute is dealing with the matter of purging the registration books, the purpose being to correct erroneous records and thereby limit the registration to those who have observed the prerequisites to the exercise of the franchise; it is a precautionary method intended to prevent those who have not met the requirements from voting, and thereby giving more relative voting strength to those rightfully registered and legally entitled to vote. The matter of purging the books is not before me. On the contrary, the question is, assuming all allegations of the petitioners to be true, were those mentioned in the petition as voting at the election on December 19th, 1910, legally entitled to vote? As the certificate of the canvassers shows there was a majority of fifty-five voting against licensing the sale of intoxicating liquors, it will readily be seen that if the contention of the contestants is sustained the result of the election will be changed. I think, therefore, the petitioners are within their legal rights in asking relief of this Court, and that § 25 of the Constitution has no influence over the issues here presented.

Petitioners, as a ground for contest, also allege among other things:

(a) That booths at the voting places were not properly arranged or constructed as required by law; that there were in fact no booths.

(b) That by-standers were permitted to congregate around the voting precincts in closer proximity than is allowed by the statute.

(c) That the ballot boxes were not kept within public view, and,

(d) That police officers and other persons were allowed within forty feet of the ballot boxes for the purpose of tallying the names of all persons offering to vote, etc.

That these are all violations of the law which the officers charged with the duty of conducting the election should not have permitted, seems too clear to be open to discussion; but they were participated in by both sides and the errors and irregularities in the conduct of the election are chargeable as much to one side as to the other. The petition does not allege that any votes were improperly received or rejected on account of any of the

irregularities set forth above, nor does it give the name of any voter whose ballot was so improperly received or rejected. It does not charge that the result of the election was in any way changed or made doubtful because of any of the irregularities charged, nor are the allegations therein made sufficient to justify the conclusion that the by-standers or police officers were in such close proximity to the voters as to know how they voted, or by any reasonable possibility to have affected the freedom of their action in this particular.

I, therefore, think the demurrer to the petition as respecting the various allegations above set forth should be sustained.

"General averments of fraud, mistake, intimidation, and the like are but conclusions of law. The particular facts relied on must be set forth. In a contest of an election on the ground that voters were intimidated, the petition should set forth the names of the persons deterred from voting, and allege that they would have voted for the defeated candidate, or on the losing side of the question submitted to the voters at the election, and that the number of voters so intimidated was such that the result of the electi n would have been different if they had voted." 15 Cyc., page 405.

"It is the duty of the court to sustain an election authorized by law if it has been so conducted as to give a free and fair expression of the popular will, and the actual result thereof is clearly ascertained; for elections should never be held void unless they are clearly illegal. In the absence of fraud mere irregularities in the conduct of an election, where it does not appear that the result was affected either by the rejection of legal votes or the reception of illegal ones, will not justify the rejection of the whole vote of the precinct, although the circumstances may be such as to subject the officers to punishment." 15 Cyc., page 316.

This brings me to the final and vital question in the case, namely: Can a person vote whose name has been placed on the registration books since January 1st, 1904, if he has failed to comply with clause 2 of § 20 of the Constitution which has been heretofore set forth at length?

I think the law is well settled that constitutional provisions relating to qualification of voters and the conduct of elections, if directory, do not in the absence of fraud vitiate an election; it is likewise not open to discussion, that provisions mandatory in their character cannot be ignored by those charged with the duty of executing them.

What then is the character of the provision in question?

"The great majority of all constitutional provisions are mandatory, and it is only such provisions as, from the language used,

in connection with the objects in view, may be said to be addressed to the discretion of some person or department, that courts have held to be directory; and these provisions in most cases have been those addressed to the legislative department with reference to the mode of procedure in the enactment of laws as above stated. But provisions of this kind will be treated as mandatory if the language justified it, even though the proceedings to which they refer are but formal. Whatever is prohibited or positively enjoined must be obeyed; therefore all prohibitions and restrictions are necessarily mandatory. So also all provisions that designate in express terms the time or manner of doing particular acts and are silent as to performance in any other manner are mandatory and must be followed." 8 Cyc., page 762.

In the very recent case of Capite *v.* Topping (W. Va.), 64 S. E. R. 845, Judge Peffenbarger, in delivering the opinion of the Court, said in part, as follows:

"Constitutional provisions are organic. They are adopted with the highest degree of solemnity. They are intended to remain unalterable except by the great body of the people, and are incapable of alteration without great trouble and expense. They are the frame-work of the state as a civil institution, giving cast and color to all its legislation, jurisprudence, institutions, and social and commercial life by confining the Legislature, the executive, and judiciary within prescribed limits. All the great potential, dominating, creative, destroying, and guiding forces of the state are brought within their control so far as they apply."

In Cooley's Constitutional Limitations, Seventh ed., page 114, the author says:

"But courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes, to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations to the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of government must at all times shape their conduct."

And on page 119 he says:

"And we fully concur in what was said by Mr. Justice Emmot in speaking of this provision, that 'it will be found upon full consideration, to be difficult to treat any constitutional provision as merely directory, and not imperative.'" Citing People *v.* Lawrence, 36 Barker, 186.

Judge Christian in Wolfe *v.* McCaull, etc., 76 Va. 886, says: "The Constitution prescribes with minuteness the course the Governor must pursue with regard to bills placed in his hands, and its mandates are imperative. The Constitution fixed his duty. He cannot evade that duty if he would, etc."

In the light of the authorities cited and many others that could be vouched were it necessary, I find no difficulty in concluding that the clause of the Constitution first herein referred to (§ 20, clause 2) is mandatory and the observance thereof on the part of the voter necessary in order to give jurisdiction to the registrar to act.

Now if the clause referred to is mandatory and if the provision has been ignored by the voter and the registrar alike in the manner charged in the petition, then the conclusion is irresistible that the persons whose names were placed upon the registration books without having complied with the provisions, were placed there without legal authority; the act of the registrar in placing their names on the book was ultra vires and void, and the vote of such person should not be considered in ascertaining the result of the election in which they have participated. Unless the voter has applied for registration in the mode prescribed by law there has been no application to register, and therefore no registration. The privilege of registering is personal to the voter and he cannot be placed upon the books until he has legally applied for registration. The registrar has no jurisdiction in the premises until there has been an application to him as specifically provided by the Constitution. If the registrar can place upon the books a name when the person entitled to register has not made application as required, then verily, can the registrar, if so minded, qualify against their will all of those persons who, up to this time, have not seen fit to qualify themselves.

To permit registrars, judges of election, or other servants of the people, to reject provisions which are mandatory and thereby become arbiters of the qualification of voters is to give them the power, if minded to use it, of determining the electorate which shall pass upon any and every question that may arise. If such can be done under and within the law, then indeed was our constitutional conventional called into being and did its work to little purpose. Strange it is, if a provision so important as to be placed beyond the reach of legislative interference, by being incorporated in the organic law of the Commonwealth, can be set at naught by an indirect creature of the legislature according as his taste, discretion, or interest may incline him. Certainly such a construction should not receive judicial sanction unless the language used is so plain as to admit of no other. It seems to me the language of the Constitution needs no construction, but

should be accepted, and the simple and plain mandates thereof observed.

The observations, last above made, have no reference to any election officer, as there is not only no evidence of any conscious wrongdoing on the part of the registrars, or any of those conducting the election, but it is not even contended or intimated by counsel that such was the case. The observations were made to demonstrate the facility with which election frauds could be perpetrated, and the clear object and purpose of the Constitutional provision rendered inoperative and ineffectual.

The importance of the questions raised affecting not only the particular election now being contested, but all future elections that may be held under the present state of the law, and the desire that the law as respects them may be understood and set at rest in this jurisdiction is my only excuse for setting forth at such length my views on this very important subject.

IN THE CORPORATION COURT OF THE CITY OF LYNCHBURG, VIRGINIA.

ANDERSON *et al. v.* CRADDOCK *et al.*

March 6, 1911.

Constitutional Law—Elections—Registration—Effect of Noncompliance with Requirements of Law.—Judges of election cannot review the findings of the registrars upon applications for registration made to them under the Constitution of 1904, § 20, and while the provisions of that Constitution may be said to be mandatory as to such registrars, (except the 3rd clause), their failure to require an application in writing, etc., makes the registration only voidable and not void. The court hearing the contest proceedings to set aside the result of an election at which voters so registered have voted, has no jurisdiction to declare it void simply because the registrars were grossly negligent in the performance of their duties, and registered many voters illegally.

For petitioners: *Hon. A. A. Phlegar, Geo. E. Caskie* and *Thos. Whitehead, Jr.*

For contestees: *Randolph Harrison, J. Tinsley Coleman* and *Fred Harper.*

OPINION.

F. P. CHRISTIAN, Judge: The elaborate and exhaustive arguments in this case, together with the number of authorities cited,